(23) (24)

Nos. 96-552 and 96-553

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

RACHEL AGOSTINI, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

CHANCELLOR OF THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, *et al.*,
Petitioners,

v.

BETTY-LOUISE FELTON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR PETITIONERS RACHEL AGOSTINI, ET AL.

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39 pp

QUESTIONS PRESENTED

1. Whether this Court should overrule its decision in *Aguilar v. Felton*, 473 U.S. 402 (1985), which held that the Establishment Clause prohibits the furnishing of Title I remedial services to eligible parochial school children in the same setting as their public school counterparts—on the premises of the schools they attend.

2. Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioner seeks.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were:

Betty-Louise Felton, Charlotte Green, Barbara Hruska, Meryl A. Schwartz, Robert H. Side and Allen H. Zelon, plaintiffs;

the Chancellor of the Board of Education of the City of New York and Board of Education of the City School District of the City of New York, defendants;

the Secretary of the United States Department of Education, defendant; and

Rachel Agostini, Maria Cosarca, Digna Duran, Ivette Encarnacion, Maria L. Fernandez, Dolly Cutrera Then and Joseph M. Then, Margaret Figueroa, Michele Gallo, Marie Sejour, Joan Jackson, Cheryl Malcousu, Tonya Stevens and Rosemarie Vasquez, defendant-intervenors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The Memorandum and Order of the district court is unreported and is reproduced in the Appendix to the Petition for a Writ of Certiorari (hereinafter "Pet. App.") at 1a. The court of appeals' Summary Order is unreported and reproduced at Pet. App. 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 30, 1996. The petition for a writ of certiorari was filed with this Court on October 7, 1996 and granted on January 17, 1997. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ....

Rule 60(b) of the Federal Rules of Civil Procedure provides in relevant part:

> (b) . . . On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. . . .

STATEMENT

When this case was last before this Court, the Court held that the Establishment Clause prohibits the furnishing of Title I remedial educational services to eligible school children on the premises of church-related schools. *Aguilar v. Felton,* 473 U.S. 402 (1985). Specifically, the Court ruled that providing Title I services to parochial schoolchildren in their regular school buildings gave rise to excessive entanglement of church and state.

After that decision, school boards in New York City and throughout the country struggled to find alternative methods of delivering Title I services to eligible children attending church-related schools—alternatives that have proven to be both more expensive and less effective than on-premises instruction.

At the same time, this Court has retreated from the interpretation of the Establishment Clause that prevailed in *Aguilar*—to the point that five Members of the Court have expressly called for *Aguilar's* overruling or invited its reconsideration. *See Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687, 717 (O'Connor, J., concurring in part and concurring in the judgment), 731 (Kennedy, J., concurring in the judgment), 750 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (1994). Petitioners now ask this Court to reject the incoherent "entanglement" analysis employed in *Aguilar*, to apply the teachings of its more recent cases, and to overrule *Aguilar* once and for all.

A. Title I

Title I of the Elementary and Secondary Education Act of 1965 was the centerpiece of a congressional effort to "bring better education to millions of disadvantaged youth who need it most." S. Rep. No. 89-146 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1446, 1450. Having determined that "there is a close relationship between conditions of poverty and lack of educational development," *id.*, Congress passed Title I to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families. By enabling local educational agencies to expand and improve their programs for meeting the special educational needs of economically and educationally deprived

children, this legislation was to be a "very potent instrument . . . in the eradication of poverty and its effects." *Id.*[1]

The program enacted in 1965 has remained in effect, under the name Title I or Chapter 1, for over three decades.[2] Throughout that period it has been the federal government's largest and most important commitment to elementary and secondary education,[3] with appropriations in fiscal year 1995 totaling $7.4 billion. 20 U.S.C. § 6302(a).

Title I grants are provided to qualifying state educational agencies, which in turn distribute the funds to eligible local educational agencies ("LEAs"), which have the responsibility for managing Title I programs. 20 U.S.C. §§ 6302(a), 6332-35. In New York City, the local educational agency is the Board of Education of the City of New York.

To be eligible for Title I remedial services, a child must be both economically and educationally disadvantaged. A child is economically disadvantaged if he resides in an area that has a high concentration of low-income families. 20

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[1] The early history of Title I is discussed in this Court's opinion in Aguilar, 473 U.S. at 404-06 & nn.1-3.

[2] The program was reenacted as Chapter 1 of the Education Consolidation and Improvement Act, part of Pub. L. No. 97-35, 95 Stat. 357, 464 (1981), and later as Chapter 1 of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130. In 1994, pursuant to the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified in relevant part as 20 U.S.C. §§ 6301-38), Congress renamed the Chapter 1 program Title I, Part A [hereinafter "Title I"]. Today's Title I program is identical to its predecessors in all respects relevant to this case.

[3] *See* 60 Fed. Reg. 34,800 (1995); H. Rep. No. 103-425 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2810 ("Title I . . . [is] the largest federal elementary and secondary educational program.").

U.S.C. § 6313. He is educationally disadvantaged if he is progressing at a level below normal for his age. 20 U.S.C. § 6315(b).

Children attending both public and private schools are eligible for Title I remedial services, if they meet the statutory criteria of economic and educational disadvantage. 20 U.S.C. §§ 6313, 6315(b), 6321. Eligibility is determined without regard to the religious affiliation of the student or the school he attends. Federal law, in fact, requires that instructional services be provided to private school students "on an equitable basis" with their public school counterparts. 20 U.S.C. § 6321(a); C.F.R. § 200.10(a)-200.11 (1996); 34 C.F.R. § 200.52(b) (1994).

Title I funds, however, may not be used to meet the "needs of the private school" itself or the "general needs of children in the private school." 34 C.F.R. § 200.12(b) (1996). Title I funds may be used only for services that supplement, and do not supplant, services otherwise available from nongovernmental sources. 20 U.S.C. § 6322(b); 34 C.F.R. 200.12(a) (1996). And all Title I services must be "secular, neutral, and nonideological." 20 U.S.C. § 6321(a)(2).

Consistent with these general requirements, the LEA must keep title to and exercise administrative control over all equipment and supplies acquired with Title I funds. 34 C.F.R. § 200.13(a) (1996).

Prior to *Aguilar*, educational services were permitted to be provided on the premises of a private school,[4] but only "[t]o the extent necessary to provide equitable [Title I]

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[4] In *Wheeler v. Barrera*, 417 U.S. 402, 422 (1974), this Court noted that Congress had anticipated that "one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction."

services," and, again, only if these services were "not normally provided by the private school." *Id.* § 200.73 (1983). *See also* S. Rep. No. 89-146, at 12. If the LEA chose to provide Title I services on private school premises, it was required to "ensure that the equipment or supplies placed [there] . . . are used for [Title I] purposes." 34 C.F.R. § 200.74(c)(1) (1983).

The basic educational composition of Title I services for private school students has remained essentially unchanged since 1965. Instruction is provided in reading, mathematics and English as a second language. Title I also provides clinical and guidance services to eligible children. Joint Appendix (hereinafter "JA") 311.

B. Implementation of Title I Before *Aguilar*

In 1966, after the enactment of Title I, the Board of Education of the City of New York (the "Board") began to provide remedial educational services to economically and educationally disadvantaged students in both public and private schools. Initially, New York City attempted to provide the services after regular school hours—first, on public school premises and, later, on private school premises. Both of these after-hours experiments failed. Attendance was poor. Students were unreceptive. Teachers were tired. Parents were concerned about the safety of their children traveling home after dark or in inclement weather. Communication between Title I teachers and regular classroom teachers, which is vital in remedial education, was all but impossible. JA 63-64, 312.[5]

[5] An investigative team of the Office of Education of the United States Department of Health, Education, and Welfare found similar problems in 1976 in an after-hours Title I program in Missouri. JA 34-37.

Faced with these problems, the Board concluded in August 1966 that the only practical method of meeting its obligation to provide private school children with equitable Title I services was to provide those services in the same fashion in which they were delivered to public school students—during regular school hours in classrooms located in the students' regular schools. JA 64-66, 312. That method of providing Title I services continued until this Court's decision in *Aguilar*.[6]

Under the pre-*Aguilar* program, teachers employed by the Board went to the private schools solely to provide Title I instruction to eligible students. *See Aguilar v. Felton*, 473 U.S. at 406. Every teacher and professional in New York's private school Title I program was given detailed written and oral instructions that (1) they were employees of the Board and were accountable only to their public school supervisors, not to any private school officials; (2) they had sole responsibility for selecting students for the Title I program and would teach only children who meet the eligibility criteria for Title I aid; (3) their materials and equipment would be used only in the Title I program; (4) they could not engage in team-teaching or other cooperative instructional

[6] Throughout the pre-*Aguilar* period, the Board had continued to examine the option of off-premises Title I instruction for private school students. A study conducted by City school officials in the 1977-1978 school year concluded that if Title I services were provided to private school children at public schools, more than 40 percent, or $4.2 million, of the total budget for the private school Title I program would have to be diverted to such non-instructional costs as transportation, security, and building maintenance. It was anticipated that such a diversion of funds would require the elimination of 167 teaching positions in the private school Title I program and the elimination of instructional services to 36 percent, or 5,000, of the private school students who participated in the Title I program during the 1977-1978 school year. JA 66-68.

activities with private school teachers;[7] and (5) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. JA 50-51. Comparable guidelines are in place today to secure the secular quality of Title I instruction to religious school students. JA 643.

In *Aguilar*, the appellees (respondents here) presented no evidence whatsoever that any of these guidelines had ever been violated since the inception of the on-premises program in 1966. In particular, there was no evidence that any Title I teacher had ever injected religious content into any Title I class or ever engaged in any religious activity while at a private school. JA 55.

Prior to 1985, pursuant to instructions given by the Board to participating nonpublic schools, Title I teachers used classrooms that were specifically designated for Title I instruction and that were free of any religious symbols. JA 59. The nonpublic schools were not reimbursed for classroom space. The material used in the classes had no religious content. JA 56. The Board retained title to the materials and equipment used in Title I classes. Teachers kept the materials locked in storage cabinets when they were not in use, and the materials were subject to an annual inventory. JA 56-57.

Contacts between Title I administrators and private school officials were (and are) routine in character and limited to

[7] A remedial program can be effective only if the remedial teacher consults with the regular classroom teacher to determine the student's particular needs and to check his classroom progress in the subject in which he is receiving remediation. While Title I teachers are told such consultations are permissible, they are instructed to confine them to mutual professional concerns about their students' educational needs and not to discuss any matters of a religious nature. JA 51-52; 646-47.

three general categories—dissemination by Title I administrators of basic information about the program, submission by private school principals of standard requests for Title I services, and responses by Title I administrators to routine inquiries from private school officials about scheduling and the like. JA 59-61. No evidence was presented in *Aguilar* to suggest that these administrative contacts had involved Title I administrators in the curricula or internal operations of the private schools, or that private school officials had attempted to exercise any control at all over the Title I program.

C. *Aguilar* and Its Aftermath

In 1978, respondents challenged the provision of Title I services to students inside religiously affiliated schools as a violation of the Establishment Clause. The district court rejected the challenge,[8] but the court of appeals reversed. *Felton v. Secretary*, 739 F.2d 48 (2d Cir. 1984). The court of appeals described New York's Title I program as one "that apparently has done so much good and little, if any, detectable harm." *Id.* at 71. The court of appeals, however, felt compelled by this Court's decision in *Meek v. Pittenger*, 421 U.S. 349 (1975), to find that the program violated the Establishment Clause.

[8] The district court agreed with the three-judge court in *National Coalition for Public Education & Religious Liberty ("PEARL") v. Harris*, 489 F. Supp. 1248 (S.D.N.Y. 1980), which had upheld New York City's on-premises program. The plaintiffs in that case had sought review in this Court, but the jurisdictional statement was filed out of time and the appeal was dismissed for want of jurisdiction. 449 U.S. 808 (1980). These plaintiffs then renewed their challenge in this case, and the parties stipulated that the case should be decided on the evidentiary record developed in *PEARL*, along with two affidavits updating the record.

This Court affirmed, holding that delivery of Title I services on the premises of sectarian schools gave rise to an excessive entanglement of church and state. Upon remand, the district court enjoined the U.S. Secretary of Education and the Chancellor of the Board from providing Title I services on the premises of sectarian schools. Pet. App. 14a.[9]

The decision in *Aguilar* threw New York's Title I program—and Title I programs around the country—into turmoil. The decision forced the City of New York to implement alternative methods of delivering Title I services to parochial school children. The alternatives included the use of public school classrooms, mobile instructional units or vans, leased sites, and computer-assisted instruction in the parochial schools. Substantially similar alternative methods were implemented in other school districts around the country.

These post-*Aguilar* Title I delivery methods are vastly more expensive than the on-premises instruction that was prohibited in *Aguilar*. In New York City alone, the additional cost of providing Title I services by way of these alternative methods has been approximately $15 million per year. The total cost of compliance with *Aguilar* in New York City alone has been well in excess of $100 million to date.[10]

The post-*Aguilar* delivery methods are also educationally inferior to on-premises instruction by Title I teachers. Eligible students in parochial schools are required to leave

[9] *Felton v. Secretary*, 78 CV 1750 (ERN) (E.D.N.Y., Sept. 26, 1985) (Pet. App. 14a), *aff'd*, 787 F.2d 35 (2d Cir. 1986).

[10] JA 336 (approximately $15 million per annum), 345 ($87 million through 1993-94); Pet. App. 18a ($16 million for 1995-96).

their school buildings to receive the instruction they need. That results in disruption and lost instructional time, which is something that these students—the very ones who are experiencing the greatest difficulty keeping up with their regular instruction—can ill afford.[11] Students who receive computer-assisted instruction in their regular school building avoid the disruption and loss of instruction time, but are denied the advantages of face-to-face contact with a teacher. JA 331.

D. The Decisions Below

In late 1995, these petitioners, parents of parochial school children receiving Title I instruction, and the Chancellor of the Board filed separate motions pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from the judgment that was entered pursuant to this Court's decision in *Aguilar*. As the Establishment Clause is currently understood and applied, the movants argued, there is no constitutional impediment to providing Title I services to parochial school children in the same setting in which their public school counterparts receive the same services—in their regular school buildings. The movants noted that five Justices had called for the overruling or reconsideration of *Aguilar*, and argued that subsequent decisions of the Court were in fact inconsistent with *Aguilar*.

The district court concluded that the movants had properly invoked Rule 60(b)(5) to seek relief from a continuing injunction based on a change in the governing law. Pet. App. 9a-10a. It observed that "[i]n the years since the Supreme Court's *Aguilar* decision, the landscape of Establishment Clause decisions has changed," and that "it is

[11] JA 329-30; *see also* S. Rep. No. 100-222 at 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 101, 114 (noting disruptive effects of post-*Aguilar* delivery methods).

at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 4a, 7a-8a. The court concluded that the movants

> should be permitted to seek the reconsideration of *Aguilar* that a majority of the Supreme Court appears willing, if not anxious, to undertake. In addition, there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision.

Pet. App. 10a. The district court denied the motion on the merits, and the court of appeals affirmed "substantially for the reasons stated in Judge Gleeson's Memorandum and Order." Pet. App. 13a.

SUMMARY OF ARGUMENT

I. This Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 8 (1993). Title I is the paradigm of a religion-neutral program. Purely secular services are made available directly to disadvantaged school children, whatever their religion and wherever they attend school.

The reason why a program like Title I is not "readily subject to an Establishment Clause challenge," *id.*, is that such a program "respect[s] . . . both the Free Exercise and the Establishment Clauses" by "pursu[ing] a course of 'neutrality' toward religion." *Committee for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973). Title I is scrupulously neutral toward religion, and an

important element of its overall neutrality is that services be offered to all eligible school children in the same convenient and effective setting—where they attend school.

Neutrality or evenhandedness may not be sufficient to save a program of government aid that directly funds or subsidizes religious activity. *See Rosenberger v. Rector of the Univ. of Virginia*, 115 S. Ct. 2510, 2523 (1995); *id.* at 2540-44 (Souter, J., dissenting). But Title I does not directly fund religious activity. It does not even indirectly subsidize religious activity. It provides purely secular services directly to eligible school children, and it does not take the place of any instruction provided by the school. JA 660-61, 685-86.

Aguilar held that on-premises Title I services violated the "excessive entanglement" prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But since *Aguilar* was decided, the entanglement prong has been criticized by the Court for precisely the "Catch-22" quality that it had in *Aguilar*: "the very supervision of the aid to assure that it does not further religion renders the statute invalid." *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988).

The entanglement prong should be abandoned as an independent test under the Establishment Clause. It rests on an ideal of total separation of church and state that is unnecessary to a faithful application of the religion clauses, and it undermines the notion of neutrality that is necessary to a proper understanding of those clauses. As a result of entanglement analysis, groups or individuals with religious affiliations are excluded altogether from programs that are intended for the benefit of all citizens or, as in *Aguilar*, they are denied participation on equal terms.

The entanglement test suffers from other defects as well. By inviting the courts to rely upon speculation, rather than evidence, about the effects of the government's contact with

religion, the test sets aside the ordinary burden of proof that requires the plaintiffs to *prove* their legal claims. And by focusing on the inhibiting effects those contacts might have on the free exercise of religion *by church adherents*, the test addresses potential claims that the plaintiffs lack standing to assert.

Even if the entanglement test retains vitality, the Court should overrule the entanglement holding in *Aguilar* as an unwarranted and illogical extension of *Lemon*. *Lemon* was based on the fear that *full-time parochial school teachers* subsidized by the state might inject religion into their classes; it held that the supervision of those *parochial school teachers* by the state constituted excessive entanglement of church and state. But there is no comparable risk that *publicly employed* Title I teachers would inject religion into their secular classes. And, even more obviously, any supervision to guard against such an event could not conceivably constitute excessive entanglement of church and state because, unlike *Lemon*, the supervision is of a *public employee* by another public employee. In short, the supervisory relationship is not between church and state at all, but between state and state.

II. Rule 60(b) is the established procedural vehicle for seeking relief from the prospective effects of a continuing injunction, and there is nothing that rendered that vehicle inappropriate in this case. The courts have inherent power to modify or vacate their injunctions, and that power is no less applicable when entry of the injunction has been affirmed or directed by this Court. This Court so held in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976).

The motions in this case were prompted by the extraordinary financial strains caused by the injunction and by the substantial legal changes reflected in this Court's intervening Establishment Clause cases. A majority of this

Court had invited a request to reconsider *Aguilar* in a proper case. *Kiryas Joel*, 512 U.S. at 717, 731, 750. And, as the courts below noted, it is difficult to think of a more appropriate case in which to request reconsideration of that decision than the very case in which the parties are subject to its direct and continuing effects.

ARGUMENT

I. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT OFFERING TITLE I REMEDIAL SERVICES ON THE PREMISES OF CHURCH-RELATED SCHOOLS

A. Title I Provides Purely Secular Benefits on a Religiously Neutral Basis.

"Neutrality is what is required" by the Establishment Clause—neither endorsement nor hostility, neither favoritism nor discrimination, but neutrality. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 747 (1976) (opinion of Blackmun, J.) It is a "proper respect for both the Free Exercise and the Establishment Clauses [that] compels the State to pursue a course of 'neutrality' toward religion." *Nyquist*, 413 U.S. at 792-93. For it is only by maintaining "impartiality, not animosity, toward religion," *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring), that the government can fully protect the object of the religion clauses—the right to believe or not to believe as one chooses.

With *Aguilar* as a notable exception, this Court has for the most part adhered to these principles. "A central lesson of [the Court's] decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Rosenberger*, 115 S. Ct. at 2521.

"[T]he Establishment Clause's concept of neutrality" may not be "self-revealing." *Lee v. Weisman*, 505 U.S. 577, 627

(1992) (Souter, J., concurring). But there has never been any doubt about one of its central meanings: neutrality toward religion is promoted when government benefits are made available generally to a broad class of citizens defined without reference to religion.

That principle was decisive in two of the Court's earliest Establishment Clause decisions. In *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), the Court upheld the provision of bus transportation to public and nonpublic school children alike, explaining that the Establishment Clause "do[es] not . . . prohibit [the state] from extending its general state law benefits to all its citizens without regard to their religious belief." And in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968), the Court permitted the lending of textbooks to students in church-related schools, because "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge."[12]

This particular aspect of neutrality has been central to the Court's more recent decisions as well. *See, e.g., Board of Education v. Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act, which guaranteed student religious groups equal access to school facilities to conduct their meetings); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 487 (1986) (rejecting Establishment Clause challenge to a state's extending vocational rehabilitation assistance to a blind person studying at a religious college, because the assistance was provided to the student, not the school, and the "program is made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted") (quotation omitted); *Mueller v. Allen*, 463 U.S. 388, 397 (1983) (upholding tax deduction for educational expenses, because "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools") (emphasis in original); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (upholding a school "policy of equal access, in which facilities are open to groups and speakers of all kinds").

[12] *Allen* was decided on the same day as *Flast v. Cohen*, 392 U.S. 83 (1968), in which the Court held that taxpayers have standing to raise Establishment Clause challenges to government programs. One of the programs at issue was Title I. After winning the right to bring an Establishment Clause challenge to Title I, however, the plaintiffs in *Flast* abandoned their challenge on the merits, no doubt because *Allen* signaled that the Court would reject such a challenge. That the plaintiffs were successful 17 years later in *Aguilar* was due to the Court's temporary departure from, or failure to observe, the neutrality principle articulated in *Allen* and *Everson*.

Thus, in *Kiryas Joel*, the Court confirmed that "the [neutrality] principle is well grounded in our case law as we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges." 512 U.S. at 704.

Most recently, the neutrality principle assumed dispositive importance in *Rosenberger*. In that case, the Court upheld —in fact ordered—public university funding of the printing costs of a religious newspaper, because such funding was made available generally to qualifying student groups. The Court emphasized that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." 115 S. Ct. at 2521.

The neutrality principle applies without question in a case like this one, in which *purely secular* services are provided

directly *to students*. The majority and dissent in *Rosenberger* differed over whether that case involved a direct subsidy of a religious organization, but there is no such question in this case.[13] In this case, all that is sought is the provision to students of purely secular services that cannot be diverted for a religious purpose. The dispute is not whether the services can be offered, but only where.

The answer to that question is suggested by this Court's decision in another recent case, *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). In *Zobrest*, the Court found no constitutional barrier to a public school district's providing a sign-language interpreter for a parochial student on the premises of the parochial school. Central to the Court's reasoning was the fact that "[t]he service at issue in this case is part of a general government program that distributes benefits neutrally to any [qualified] child . . . without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." *Id.* at 10. The Court noted that it had "never said that 'religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs,'" *id.* at 8 (quoting *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988)), and that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school," *id.* at 13. The Court reasoned:

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[13] The dissenters in *Rosenberger* took the position that neutrality, or "evenhandedness," was not dispositive when, as they saw the case, direct public funding of religious activities was involved. 115 S. Ct. at 2540-44. But under the dissenters' analysis, evenhanded distribution of secular benefits to students, whose individual choices determine whether a church-related institution receives an indirect benefit, does not offend the Establishment Clause. *Id.* at 2541-42. That is the case here, assuming that there is any indirect benefit at all. *See* pp. 23-24, *infra*.

> When the government offers a neutral service on the premises of a sectarian school as part of a general program that "is in no way skewed towards religion," it follows under our prior decisions that provision of that service does not offend the Establishment Clause.

Id. at 10 (quoting *Witters*, 474 U.S. at 488). It did not matter that the religious school might derive some indirect advantage from such a program, the Court explained:

> We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit.

Id. at 8.

Title I is a "general program that 'is in no way skewed towards religion.'" *Id.* at 10. Its benefits are purely secular, and they are provided "neutrally . . . to a broad class of citizens defined without reference to religion." *Id.* at 8. It follows that Title I services, wherever they are provided, "are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated benefit." *Id.* Why? Because such a program affirmatively promotes the values of neutrality and religious freedom that underlie both of the First Amendment's religion clauses. Providing benefits to students "without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends" creates "no financial incentive for parents to choose a sectarian school." *Id.* at 10. Parents are neither encouraged nor discouraged to send their children to a church-related school. Religion is neither favored nor disfavored. Everyone can choose a religious education or a non-religious one, without suffering any penalty or receiving any reward. When the government designs such a program,

it acts in the best tradition of religious tolerance and neutrality.

The particular feature of Title I that is at issue in this case—on-premises services—is an important element of Title I's overall neutrality. Federal law requires that Title I instructional services be provided to private school students "on an equitable basis" with their public school counterparts. 20 U.S.C. § 6321(a); 34 C.F.R. § 200.10(a)-200.11 (1996); 34 C.F.R. § 200.52(b) (1994).[14] After experimenting unsuccessfully with alternative methods of providing Title I services to private school children, the New York City Board of Education concluded that the only practical method of providing equitable services to private school children was to provide those services on-site, just as they were provided to eligible public school children. JA 63-64. As a practical matter, the alternatives had proved unworkable and ineffective, with the result that "nonpublic school students were not receiving Title I benefits comparable in scope and quality to those received by public school students." JA 64. So too today, requiring private school students to leave their schools in the middle of the school day to receive remedial instruction results in disruption and lost instructional time for the very students who can least afford it. JA 329-30.

Denying children who attend a religious school the same arrangements that are available to their public and non-religious school counterparts offends the value of neutrality and evenhanded treatment. As Justice O'Connor has noted: "If the government provides this education on-site at public schools and at nonsectarian private schools, it is only fair

[14] This requirement essentially codifies this Court's holding in *Wheeler*, 417 U.S. 402, which construed earlier Title I regulations to require that eligible parochial school students receive services "comparable" to those given to public school students.

that it provides it on-site at sectarian schools as well." *Kiryas Joel*, 512 U.S. at 717.

In sum, providing Title I services to eligible schoolchildren on the premises of the religious schools they attend does not offend, but respects, the requirement of religious neutrality that is central to the First Amendment religion clauses. And as demonstrated below, providing Title I services to those students on-site does not present any of the other Establishment Clause concerns that have been identified in the opinions of this Court or its individual Justices.

B. Title I Does Not Directly Fund Or Indirectly Subsidize Religious Activity

1. *Direct Funding*

This Court has "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions." *Rosenberger*, 115 S. Ct. at 2523. But there are no direct money payments to sectarian institutions in this case. Payments under Title I are to the LEA, in this case the New York City Board of Education. The services that are purchased with Title I funds are purely secular, and those services are provided directly to students, not to the schools they attend.

Like *Zobrest*, this case is "an even easier case than *Mueller* and *Witters* [which involved, respectively, tax deductions and vocational assistance] in the sense that . . . no funds traceable to the government ever find their way into sectarian schools' coffers." *Zobrest*, 509 U.S. at 10. And this case is even easier than *Zobrest*, which upheld the use of a publicly paid interpreter even during religion class, because the services here do not assist even indirectly in the communication of a religious message.

In *Rosenberger*, the dissenters thought that the payments at issue violated the principle against "direct public funding of core sectarian activities." 115 S. Ct. at 2540. But there is no such issue in this case. Title I instruction is a purely secular activity, entirely devoid of religious content.

2. *Indirect Subsidization*

It is "well established . . . that not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Nyquist*, 413 U.S. at 771; *see also Roemer*, 426 U.S. at 747; *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973). "Thus, the Court has never accepted the mere possibility of subsidization [of a religious institution] . . . as sufficient to invalidate an aid program." *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 394 (1985). "The question in each case," the Court explained in *Grand Rapids*, "must be whether the effect of the proffered aid is 'direct and substantial,' . . . or indirect and incidental." *Id.*

In *Grand Rapids*, the Court found that the effect of state-sponsored instruction in the sectarian schools was "direct and substantial." In *Zobrest*, however, the Court distinguished *Grand Rapids* and *Meek v. Pittenger*, 421 U.S. 349 (1975), on the ground that those cases involved "direct grants of government aid [that] relieved sectarian schools of costs they otherwise would have borne in educating their students." 509 U.S. at 12. As the Court explained, "the religious schools in *Meek* received teaching material and equipment from the State, relieving them of an otherwise necessary cost of performing their educational function." *Id.* And in *Grand Rapids*, the Court explained, the programs "'in effect subsidized the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects.'" *Id.* (quoting *Grand Rapids*, 473 U.S. at 397).

Title I bears no resemblance to those programs. Unlike the program in *Meek* that was regarded as subsidizing the schools,[15] Title I provides no material or equipment to the schools. Unlike the programs in *Grand Rapids*, Title I instruction in private schools is not provided to all students, but only to those who meet the statutory criteria of economic and educational disadvantage. 20 U.S.C. §§ 6313, 6315(b).[16] And the instruction is limited to special remedial instruction that does not take the place of any instruction provided by the school. *See* 20 U.S.C. § 6322(b); 34 C.F.R. § 200.12(a) (1996).[17] Title I, in short, does not "tak[e] over a substantial portion of the [schools'] responsibility for teaching secular subjects." *Grand Rapids*, 473 U.S. at 397.

In sum, parochial schools do not receive any "direct and substantial" benefit from Title I. *Id.* at 394. Any benefit they may receive is "indirect," "remote" and "incidental." *Id.* at 393. It is limited to the possibility that parents of children in need of remedial help might find it easier to choose a parochial school if by making that choice their

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[15] As discussed below, *Meek* also involved a program of "auxiliary services" that was invalidated purely on entanglement grounds. *See* note 31, *infra*.

[16] Fewer than one out of seven children in the Catholic schools of New York City receive Title I services. In those Catholic schools in which some of the children receive Title I services, approximately two out of seven do. JA 659, 684.

[17] Uncontroverted affidavits submitted in connection with the initial motions for summary judgment in *Aguilar* and again in connection with the Rule 60(b) motions establish that the Catholic schools in New York City have not offered the types of services that are available under Title I, and that Title I did not replace any of those schools' educational offerings. JA 660-61, 665, 685-86, 690.

children do not lose their eligibility for Title I services. The benefit to the school, if any, is "attenuated," *Zobrest*, 509 U.S. at 8, 12, and it comes "only as a result of the genuinely independent and private choices of aid recipients." *Witters*, 474 U.S. at 487; *Rosenberger*, 115 S. Ct. at 2541 (Souter, J., dissenting).

C. Providing On-Site Title I Services To All Eligible Schoolchildren Does Not Constitute An Endorsement of Anyone's Religion

Precisely because of its strict religious neutrality, Title I effects no endorsement of religion. Eligible schoolchildren receive services without regard to their religion or the religious affiliation of the schools they attend, and the government, therefore, does not "convey a message that religion or a particular religious belief is *favored* or *preferred*." *County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)) (emphasis supplied by Court in *Allegheny*). Title I does not make "adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S. at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). In form and in substance, Title I makes religion irrelevant.

In *Grand Rapids*, the Court concluded that the instructional services offered by the state effected a "symbolic union of church and state" that was "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." 473 U.S. at 390. As noted above, however, the programs at issue in *Grand Rapids* were materially different from Title I. Of particular relevance to the notion of "symbolic union," one of the two programs at issue in *Grand Rapids* hired full-

time teachers in the sectarian schools to teach community education courses in the same schools. In short, the public and private programs were "united" in a single set of teachers. Although the teachers in the other program were full-time public employees, they were so integrated into the sectarian school's program that "the religious school students spen[t] their typical schoolday moving between religious school and 'public school' classes," *id.* at 391, with the result that "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction," *id.* at 375 (quotation omitted).

Whatever might be thought of the programs and decision in *Grand Rapids*, Title I does not signal "endorsement" or "disapproval" of anyone's "individual religious choices." *Id.* at 390. "[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review & Advisory Bd.*, 115 S. Ct. 2440, 2452 (1995) (O'Connor, J., concurring in part and concurring in the judgment). "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Id.* at 2454 (quotation deleted). Both "the history and administration of a particular practice" must be examined. *Id.*

No one familiar with "the history and administration" of Title I could conceivably construe it as an endorsement or a disapproval of religion. Anyone who is even minimally informed about the purely secular and supplementary character of the services, the religious neutrality of the eligibility criteria, the noninvolvement of religious school

personnel in the administration of the program,[18] and the fact that the overwhelming majority of the funds are spent on public school students[19] would recognize that Title I, as conceived and as administered, is religiously neutral.

Offering Title I services on-site to eligible religious school children does not destroy that neutrality, nor does it send a message of endorsement to a reasonable, informed observer. Such an observer would know the history of the City's failed attempts to provide services to eligible private school students off-premises. And such an observer would know that services were being offered on-site not to favor anyone, but to treat everyone the same. In sum, a reasonable, informed observer would understand that the government is simply trying to find efficacious ways to improve the lot of all children who are economically and educationally disadvantaged—and, in the process, sending a "message . . . of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (O'Connor, J.).[20]

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[18] There is, of course, a degree of cooperation and coordination between Title I teachers and the children's regular teacher, JA 59-63, 331-32, but the "State requires sectarian organizations to cooperate on a whole range of matters without thereby . . . giving the impression that the government endorses religion." *Aguilar*, 473 U.S. at 430 (O'Connor, J., dissenting).

[19] Over 90% of the students who receive Title I services attend public schools. JA 310, 605-06.

[20] If providing Title I services on-site were thought to be an endorsement of religion or an impermissible "symbolic union of church and state," then a whole host of accepted practices would be unconstitutional as well, and a great many of this Court's own precedents would have to be overturned. *E.g.*, *Everson*, 331 U.S. 1 (upholding provision of school bus service to parochial school students); *Wolman v. Walter*, 433 U.S. 229 (1977) (upholding provision of diagnostic speech, hearing and psychological services by public employees in religious schools); *Widmar*, 454 U.S. 263 (upholding use of school facilities by religious group when facilities generally available on neutral basis); *Mergens*, 496 U.S. 226 (same).

D. Title I Does Not Coerce Participation in Religious Activity

The government may not "coerce anyone to support or participate in religion or its exercise." *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part). No one has ever suggested that Title I has such a coercive effect.

E. "Excessive Entanglement of Church and State" Is No Basis to Invalidate On-Site Provision of Purely Secular Title I Services

The ultimate question in this case, as in *Aguilar*, is whether a religiously neutral program of secular benefits, which neither directly funds nor indirectly subsidizes religious activity, and which neither endorses nor coerces religious belief, nevertheless establishes religion because it involves administrative contact with religious school authorities. *Aguilar* answered that question in the affirmative. But its answer rested on a baseless interpretation of the Establishment Clause and a misconception of Title I. *Aguilar's* holding that providing on-site Title I services involves unconstitutional entanglement between the government and religion should be overruled.

The entanglement holding of *Aguilar* had three parts. First and foremost, *Aguilar* held that "the supervisory system established by the City of New York" to ensure that Title I teachers do not "intentionally or inadvertently" teach religion in their Title I classes "inevitably results in the excessive entanglement of church and state." 473 U.S. at 409. Second, the Court held that the "administrative cooperation" that is required between Title I teachers and school officials

would produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.* at 413-14 (quotation omitted). And third, the Court held that the City's need to make judgments about the program presented "dangers of political divisiveness along religious lines." *Id.* at 414. None of those fears was grounded in a proper understanding of the Establishment Clause or in a reasonable understanding of how Title I operates.

1. *"Entanglement" does not, by itself, violate the Establishment Clause*

The three-part test enunciated in *Lemon* has been widely criticized,[21] and a majority of this Court has acknowledged the criticism.[22] The entanglement prong upon which *Aguilar* was based has been subject to particular criticism,

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[21] *See, e.g.*, Paulsen, *Lemon is Dead*, 43 Case W. Res. L. Rev. 795 (1993); McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 127-34 (1992); Chopko, *Religious Access to Public Programs and Governmental Funding*, 60 Geo. Wash. L. Rev. 645, 654-60 (1992); Glendon & Yanes, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 503, 538 (1991); Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 Cornell L. Rev. 905, 908, 935 (1987); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3 (1978).

[22] *See, e.g., Kiryas Joel*, 512 U.S. at 720-21 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 750-51 (Scalia, J., dissenting); *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. at 656 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting).

not only by commentators and individual Justices, but by the Court itself.

Principal among the criticisms of the entanglement prong is that it "forbids what the 'effects' prong requires."[23] This Court has acknowledged that "Catch-22" quality of entanglement analysis. Speaking of *Aguilar* in particular, the Court observed: "the very supervision of the aid to assure that it does not further religion renders the statute invalid. For this and other reasons, the 'entanglement' prong of the *Lemon* test has been much criticized over the years." *Bowen v. Kendrick*, 487 U.S. at 615-16 (citations omitted).[24]

It is not simply the internal tension between the effects and entanglement prongs that is the problem. It is the entanglement prong's inconsistency with the underlying purpose of the religion clauses. Entanglement analysis, as exemplified in *Aguilar*, undermines the very notion of neutrality that is central to a proper understanding of the religion clauses. Groups or individuals with religious affiliations or beliefs are excluded altogether from programs that are intended for the benefit of all citizens or, as in *Aguilar*, they are denied participation on equal terms.

These results only make sense if separation, not neutrality, is seen as the overriding consideration. But separation is not a value in and of itself, and this Court has never gone so far as to suggest that complete separation of church and state is required by the Establishment Clause. Religious freedom is the object of the religion clauses—

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[23] McConnell, *supra* note 21, at 119.

[24] Justice White called the entanglement notion "curious and mystifying," "insolubly paradoxical," "redundant," "superfluous," and without "constitutional foundation." *Roemer*, 426 U.S. at 768-69 (concurring).

freedom to exercise one's own religion and freedom from the establishment of someone else's. Neutrality is a necessary condition of religious freedom, but total separation is not.

Lemon itself recognized that the Establishment Clause "do[es] not call for total separation between church and state; total separation [between church and state] is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." 403 U.S. at 614. Compulsory education laws requiring religious schools to provide education in secular subjects (and requiring the government to monitor that function) are one obvious example of government's connections with religious institutions. There are numerous others. It is a fact of modern life that religious institutions must, of necessity, have contact with the government. In and of itself, that contact tells us nothing about whether the Establishment Clause has been offended.

In fact, the entanglement test does not even ask whether either of the religion clauses has been offended; it asks only whether the government's relationship with a church *might* infringe religious liberty. As this case so amply demonstrates, the test invites the courts to invalidate government action based on speculation, not evidence. It thereby reverses the traditional burden of proof that requires the plaintiff to establish a legal claim.[25] Nowhere else in its constitutional rulings has the Court authorized such an approach.

There is another fundamental "procedural" flaw in the entanglement test: it addresses potential claims that the plaintiffs have no standing to assert. The concern underlying

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[25] *See* Glendon & Yanes, *supra* note 21, at 514; Garvey, *Another Way of Looking at School Aid*, 1985 Sup. Ct. Rev. 61, 86.

the entanglement test is not that supervisory and administrative contacts will *promote* religion in violation of the Establishment Clause, but that they may *inhibit* religion in violation of the Free Exercise Clause. In *Flast v. Cohen*, 392 U.S. 83 (1968), this Court recognized taxpayer standing to assert Establishment Clause claims in a case like this, but it did not recognize general taxpayer standing to assert free exercise claims. "[I]n ruling on standing," the Court explained, "it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. The court then emphasized that when a free-exercise claim is asserted, "the proper party emphasis in the federal standing doctrine would require that standing be limited to the taxpayers within the affected class," *id.* at 104 n.25—namely, those whose free exercise of religion is being inhibited. These plaintiffs are not in the class of citizens whose religious liberty may be inhibited by the so-called "entangling" relationships between the City and the religious schools. They have suffered no "injury in fact" as a result of those relationships. *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 485 (1982). They therefore lack standing to complain of the allegedly inhibiting effect of those relationships.

The fear of political divisiveness along religious lines—so-called "political entanglement"—is no more pertinent than administrative entanglement to a proper Establishment Clause inquiry. If the effect of governmental action is to favor or disparage religion, or to coerce participation in a religious exercise, the Establishment Clause is violated. If the effect of government regulation is to interfere with the free exercise of religion, the Free Exercise Clause may be violated. But speculative fear that some will invoke religion to support or oppose a program that does not

itself violate the religion clauses is no basis to conclude that it does. Thus, the Court has "never relied on divisiveness as an independent ground for holding a government practice unconstitutional." *Lynch v. Donnelly*, 465 U.S. at 689 (O'Connor, J., concurring).[26]

In no case since *Aguilar* itself has the Court struck down a program or practice on entanglement grounds, administrative or political. It is apparent that the entanglement prong of *Lemon*, upon which *Aguilar* was based, has lost its vitality. And whatever can be said of the rest of *Lemon*, "excessive entanglement of church and state" should no longer be regarded as an independent ground for striking down a neutral program of secular benefits that is otherwise entirely consistent with the Constitution.

2. *On-site Title I services do not give rise to "excessive entanglement"*

Even assuming that the entanglement prong of *Lemon* retains vitality, the entanglement holding of *Aguilar* should be overruled. *Aguilar* is the most extreme application of the entanglement notion, and it is entirely without logical or factual foundation.

a. Supervision of Title I teachers. The most obvious flaw in *Aguilar's* entanglement reasoning is that the "supervisory

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[26] Indeed, under the Court's own precedents, the fact that there is no direct financial subsidy of the religious school makes the "political divisiveness" argument inapplicable in this setting. Political-divisiveness-type entanglement "must be regarded as confined to cases where *direct financial subsidies* are paid to parochial schools and to teachers in parochial schools." *Mueller v. Allen*, 463 U.S. 338, 403-04 n.11 (1983) (emphasis added). *See also Bowen v. Kendrick*, 487 U.S. 589, 617 n. 14 (1988) (political divisiveness inquiry not relevant outside context of direct religious school funding); *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) (same).

system" that was held to result in "excessive entanglement of church and state" did not involve the *church* at all. Title I teachers are employed by the New York City Board of Education, as are their Title I supervisors. The supervision is thus *of* a public employee *by* a public employee. In short, the relationship is not one of *church and state* at all, but of *state and state*.

In *Lemon* the Court thought that state supervision of *parochial school teachers* excessively entangled church and state. It was more than an extension of that notion—it was a perversion—to suggest that public supervision of *publicly employed* teachers entangles church and state.[27]

Aguilar's analysis of supervision-as-entanglement was flawed from the outset. Again, the contrast with *Lemon* is instructive. In *Lemon*, the Court struck down state programs that paid a portion of the salaries of the regular full-time teachers in church-related schools. The Court noted that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." 403 U.S. at 618. Entangling "surveillance" was required to guard against "the potential for impermissible fostering of religion . . . present" when state supported teachers operate "under religious discipline." *Id.* at 619.

These concerns are for all practical purposes eliminated when, as in this case, the remedial teachers are employed not by the church-related school, but by a public school board.

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[27] The supervision involved in this case was no more than what in practical effect was mandated by *Abington School District v. Schempp*, 374 U.S. 203 (1963), which held that publicly employed school teachers may not engage in religious activity in public schools. Enforcement of this restriction necessarily requires some form of public supervision of public school teachers, wherever they teach.

Title I teachers are not "under religious discipline." *Id.* They do not report to and are not accountable to religious school officials. They do not teach the regular school curriculum, and it is no part of their job to teach or promote religion in any way. To suggest that these public employees might be induced to teach religion merely because they are temporarily located on the premises of a church related school is far-fetched and demeaning to their professionalism.[28] It is also contrary to the undisputed evidence in the case, which showed that "in 19 years there ha[d] never been a single incident in which a Title I instructor 'subtly or overtly' attempted" to teach religion. *Aguilar*, 473 U.S. at 424 (O'Connor, J., dissenting); *see also id.* at 428.

The majority in *Aguilar* ignored the 19-year record and based its fear of religious indoctrination on the broad statement that Title I services are "provided in a pervasively sectarian environment." 473 U.S. at 412. But this Court should "refus[e] to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide." *Tilton v. Richardson*, 403 U.S. 672, 681 (1971) (plurality) (citing *Board of Education v. Allen*, 392 U.S. 236).[29] It should, at the very

[28] As Justice O'Connor expressed it, "[i]t is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school," especially when "the teacher involved is a professional full-time public school employee who is unaccustomed to bringing religion into the classroom." *Aguilar*, 473 U.S. at 427 (dissenting).

[29] The Catholic schools whose children receive Title I services in New York City do not restrict admission or hiring on religious grounds (many, and in some cases, most of their students are not Catholic); they do not impose religious restrictions on the content of secular instruction; and they do not make any effort to compel their students to adopt or obey the teachings of Catholicism. JA 71-72, 659-60, 666-81, 684-85, 691-708.

least, repudiate that assumption with respect to the secular instruction that publicly employed Title I teachers provide.

In sum, in *Aguilar* the Court substituted speculative fears for the undisputed evidence that Title I teachers were unlikely to, and in fact did not, make any attempt to inject religion into their remedial classes. And then the Court compounded its error by overlooking the fact that the supervision that was employed to guard against that unlikely event was of a *state* employee by another *state* employee.[30] Even if entanglement of church and state is an independent basis for evaluating government action, it is not present in the state-to-state supervisory relationships under Title I.[31]

[30] The only element of supervision of the school that was mentioned was that Title I supervisors might have to determine what is and what is not a "religious symbol" that would have to be removed from a Title I classroom. *Aguilar*, 473 U.S. at 413. But that is a red herring. The record revealed no disagreement over what was a religious symbol and no hesitation whatsoever on the school's part in removing such symbols.

[31] The decision in *Aguilar* was based explicitly on *Meek*, which struck down a program of auxiliary services that resembled Title I in certain respects. But the context of *Meek* was quite different. The program had had just been enacted by the Commonwealth of Pennsylvania after *Lemon* had invalidated its program of subsidizing parochial school teachers. The program came to the Court, therefore, without a factual record of the kind that was present in *Aguilar*. In *Meek*, the Court recognized that the "potential for impermissible fostering of religion" that was central to *Lemon* was "somewhat reduced" by the fact that auxiliary service teachers were not employed by the schools and "not directly subject to the discipline of a religious authority." 421 U.S. at 371-72. But in the absence of any experience under the program, the Court was unpersuaded that the "potential" had been eliminated. The Court did not explain how the supervision of a public employee by another public employee could constitute entanglement of church and state, however, and *Aguilar*

b. Routine administrative contacts. Nor is there excessive entanglement in the ordinary and routine administrative contacts that do exist between Title I and school officials. As the Court noted in *Aguilar*, administrative personnel work together on scheduling, classroom assignments and requests for services. Teachers discuss "individual student needs, problems encountered, and results achieved." 473 U.S. at 413 (quotation omitted). But these routine contacts present no risk that the City will stifle religion in the schools' regular classes, nor do they present any other imaginable risk pertaining to an establishment of religion. Indeed, if these elements of cooperation are impermissible under the Establishment Clause, then parochial school students would be ineligible to participate in Title I instruction at any location. Wherever Title I services are offered to these children, there must be coordination with the administrators and teachers in their regular schools. And the coordination is not materially different simply because the instruction is offered on-site.[32]

c. Political divisiveness. Nor, finally, is there any reason to prohibit on-site Title I instruction on grounds of "political

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appears to have adopted that notion without reexamination, notwithstanding this observation of the Court in *Wolman*, 433 U.S. at 248: "It can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state."

[32] Generally applicable administrative regulations such as the coordination requirements here do not offend the Establishment Clause when imposed on religious organizations. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 395 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 696-697 (1989); *see also Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (upholding *reimbursement* for "ministerial" and "nonideological" recordkeeping, which cannot be used to foster an ideological outlook).

entanglement." The *Aguilar* majority wrote that "[t]he numerous judgments that must be made by agents of the city concern matters that . . . *may be* of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase." 473 U.S. at 414 (emphasis added). Notably, however, the Court did not identify any judgments that *are* of "deep religious significance," much less any evidence of "divisiveness along religious lines."[33]

Petitioners would agree that if City officials were to impose their judgments on matters "of deep religious significance," a free exercise issue would arise. But no one has identified such an incident. Certainly the church-related schools, which would have standing to object to such an intrusion, have not raised any complaint. The fact is that there is no evidence whatsoever of governmental intrusion in the religious affairs of the schools and "little record support for the proposition that New York City's admirable Title I program has ignited any controversy other than this litigation." *Aguilar*, 473 U.S. at 428 (O'Connor, J., dissenting).

d. Conclusion. Even assuming that excessive entanglement" of church and state is an independent basis for assessing Establishment Clause violations, there is no such "excessive entanglement" in an on-premises Title I program. Supervision of public employees by other public employees, routine administrative contacts with religious school officials, and speculative fears of political divisiveness do not in any

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[33] Just two years before *Aguilar*, the Court had said: "At this point in the 20th century . . . [t]he risk of . . . deep political division along religious lines . . . is remote . . . ." *Mueller*, 463 U.S. at 400 (quotation omitted).

meaningful sense constitute "entanglement between church and state," much less "excessive entanglement." And they provide no basis whatsoever for invalidating a religiously neutral program of secular benefits that neither funds, endorses nor coerces religious activity. *Aguilar* relied exclusively upon these considerations to conclude that Title I services may not be offered to needy children in church-related schools in the same convenient and effective setting in which services are offered to students in public schools. That result did not protect, but offended, the principles of religious freedom, tolerance and neutrality that underlie the First Amendment's religion clauses. *Aguilar*, therefore, should be overruled.

II. RULE 60(b) IS A PROPER VEHICLE FOR SECURING RELIEF FROM THE JUDGMENT

For over a decade, the parties to this case have been operating under a continuing injunction that prohibits the government defendants from furnishing Title I services to the children of the intervenor-defendants (these petitioners) on the premises of their regular schools. Significant factual and legal developments during that period have led the petitioners to seek relief from the continuing injunction.

First, as a factual matter, the costs of compliance with the injunction have had a devastating effect upon the Title I program in New York. Not only have parochial school children been forced to accept arrangements that are educationally inferior to on-site instruction, but thousands of other needy children in public and private schools alike are being deprived of Title I services altogether. The reason is simple: the post-*Aguilar* Title I delivery methods are vastly more expensive than the on-premises method that they replaced. Well over $100 million has been spent *in New York City alone* to cover the additional cost of providing Title I services through these alternative means, and that

figure increases by $15 million every year. JA 333-37, 345. Comparable costs have been incurred in connection with the provision of Title I services in other school districts throughout the country.[34]

In short, money that could be used to increase the number of children who receive services under Title I is being spent instead to cover the extra costs of providing educationally inferior services to a smaller number of children. The effect in New York City alone is dramatic. In the 1995-96 school year, as many as 5600 additional educationally needy children might have received Title I services—in both public and private schools—through funds that were spent instead to cover the additional administrative costs of complying with *Aguilar*.[35]

This Court has stated that "the Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman v. Walter*, 433

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[34] *See, e.g., Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1463 (9th Cir. 1995); *Pulido v. Cavazos*, 934 F.2d 912, 925 (8th Cir. 1991).

[35] *See* Pet. App. 18a. It is not only parochial school students, but also public school students, who are affected. To comply with the statutory mandate that educational services be provided equitably to both public and private school students, the Secretary of Education has ordered that the administrative costs of the alternative delivery systems be taken "off the top" of a school district's Title I allocation. JA 335; 34 C.F.R. § 200.52(a)(2)(1994). In other words, local educational agencies must subtract administrative costs of complying with *Aguilar* "off the top" of their total allocation for all eligible students, before dividing remaining funds pro rata between eligible public and private school students. The result is that fewer Title I dollars are available for actual instruction to public and private school students alike.

U.S. 229, 247 n.14 (1977). But *Aguilar* has had precisely that effect.

Second, as discussed, the decision in *Aguilar* has been seriously undermined by subsequent developments in this Court's Establishment Clause jurisprudence. The entanglement prong of *Lemon*, upon which *Aguilar* was based, has fallen into desuetude and been explicitly criticized in the opinion of the Court in *Bowen*. 487 U.S. at 615. Decisions such as *Witters*, *Zobrest* and *Rosenberger*, which upheld the provision of secular benefits on a religiously neutral basis, appear to foreclose any other rationale for *Aguilar*. So powerful are the indications that *Aguilar* no longer reflects the prevailing interpretation of the Establishment Clause that a majority of the Members of this Court have expressly called for its explicit overruling or reconsideration.[36]

If reconsideration of *Aguilar* is warranted, then surely the parties who are subject to the continuing injunction in the case are appropriate parties to seek it. Reconsideration is awaiting "a proper case." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J.). As the district court observed, "there could scarcely be a more appropriate [case] . . . than the same case, in which, eleven years later, the same school board is struggling with the consequences of the Supreme Court's decision." Pet. App. 10a. And Rule 60(b), which authorizes relief from a judgment when "it is no longer equitable that the judgment should have prospective application" or for "any other reason justifying relief," is the

[36] *See, e.g., Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring in part and concurring in the judgment), 731 (Kennedy, J., concurring in the judgment), 750 (Scalia, J., joined by Rehnquist, C.J. and Thomas, J., dissenting).

the proper procedural vehicle for the petitioners' requests. Fed. R. Civ. P. 60(b) (5), (6).

A. Federal Courts Have Power To Grant Relief from a Continuing Injunction.

Federal courts have all the powers of a traditional court of equity to entertain motions addressed to their own injunctions. As Justice Cardozo expressed it:

> We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions . . . . [Even if power to modify were not spelled out in terms], power there still would be by force of principles inherent in the jurisdiction of the chancery.

United States v. Swift & Co., 286 U.S. 106, 114 (1932). As this Court has explained, "a sound judicial discretion may call for the modification of the terms of an injunction decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen." *System Federation No. 91 v. Wright*, 364 U.S. 642, 647 (1961).

Rule 60(b) is not the source of the courts' power to grant relief from an injunction; the rule merely provides a vehicle for its exercise. "Rule 60(b) . . . reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1460 (1995) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)).[37] This power is plenary in the absence of a clear limitation upon it. "Unless otherwise provided by statute, all the inherent

[37] Thus, "Rule 60(b) . . . is simply the recitation of pre-existing judicial power." *Plaut*, 115 S. Ct. at 1461.

equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).[38]

In sum, there can be no doubt that the federal courts have power to modify or vacate their injunctions, and that Rule 60(b) is the appropriate procedural vehicle for seeking such relief.

B. That the Case Was Decided by This Court Does Not Deprive the District Court of Its Power to Entertain a Rule 60(b) Motion

That an injunction is approved or directed by an appellate court, even by this Court, does not deprive the district court of the power, or jurisdiction, to entertain a request to vacate or modify it. The Court so held in *Standard Oil Co. v. United States*, 429 U.S. 17 (1976). In that case, petitioners filed a motion in the Supreme Court three years after the Court had affirmed an injunction, asking the Court to recall its mandate and grant leave to file a Rule 60(b) motion in the district court. In the past, the Court had held that appellate leave was required to reopen a case that had been decided on appeal. But the Court explicitly abandoned that requirement in *Standard Oil*, holding that "the District Court may

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[38] The Court elaborated:

> Comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Porter, 328 U.S. at 398 (quoting *Brown v. Swann*, 35 U.S. (10 Pet.) 497, 503 (1836)).

entertain a Rule 60(b) motion without leave by this Court." *Id.*

In *Standard Oil*, the Court addressed both of the concerns that have been advanced by the respondents in this case—that allowing Rule 60(b) motions in the district court in cases decided by the Supreme Court would compromise the interest in finality and open the floodgates to frivolous Rule 60(b) applications. "[T]he interest in finality," the Court explained, "is no more impaired in this situation than in any Rule 60(b) proceeding." *Id.* at 19. And, the Court added, it had "confidence in the ability of the district courts to recognize frivolous Rule 60(b) motions." *Id.*

It is thus well established that "even after judgment is entered on the mandate . . . the district court has the power to consider a motion under Rule 60(b) for relief from judgment." 1B J.W. Moore, et al, Moore's Federal Practice, ¶ 0.404[10] at II-61 (1995) (discussing law-of-the-case). That is true whether the motion is based on a change in the facts or a change in the law. As the Seventh Circuit has concluded, "where a change in law is an event arising after the appellate court mandate, . . . under the principles of *Standard Oil*, we believe a district court has jurisdiction to address [it]." *LSLJ Partnership v. Frito-Lay, Inc.*, 920 F.2d 476, 478 (7th Cir. 1990).

Under *Standard Oil*, the petitioners acted properly in directing their Rule 60(b) motions directly to the district court without seeking appellate leave, and the district court was correct in determining that the motions were properly directed to it.

C. There Was No Alternative to a Rule 60(b) Motion

A motion under Rule 60(b) is not only a *proper* vehicle for seeking relief from the judgment, as *Standard Oil* makes

clear; it is the *only* available vehicle. Petitioners cannot proceed through a separate action for a declaratory judgment. Absent a modification of the judgment in this case, the principle of *res judicata* would bar a separate suit between the same parties. Indeed, a declaratory judgment action would face an additional obstacle: the absence of a defendant to give the case the adverseness necessary to create a case. All of the parties who have any involvement in New York City's Title I program—the city, state and federal governments and the parent-intervenors—agree that *Aguilar* should be overruled. That leaves the taxpayer plaintiffs as the only potential defendants. And although this Court's decisions give those taxpayers standing to bring an Establishment Clause challenge, the law does not permit petitioners to make them defendants in a declaratory judgment action.

Nor is there any way for these parties, or any others, to seek *Aguilar's* overruling in any other case that has arisen in its aftermath. There have been a series of lawsuits filed across the country in which plaintiffs have attempted to extend *Aguilar* by arguing that the Establishment Clause prohibits the alternative arrangements that have been implemented in its wake. These challenges have been rejected by the United States Courts of Appeals for the Sixth, Seventh, Eighth and Ninth Circuits, and by the same district court that decided these 60(b) motions.[39] *Yet in none of these cases have pro-Aguilar plaintiffs petitioned for certiorari in this Court*. The clear signals of *Aguilar's* impending demise have produced a situation in which cases

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[39] *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995); *Board of Ed. v. Alexander*, 983 F.2d 745 (7th Cir. 1992); *Barnes v. Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Pulido v. Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Committee for Public Ed. and Religious Liberty v. Secretary*, 942 F. Supp. 842 (E.D.N.Y. 1996).

that might present an opportunity to overrule *Aguilar* are being strategically withheld from the Court's consideration.

In the district court, respondents suggested that the only available mechanism for challenging *Aguilar* would be for the Board of Education to implement on-premises instruction in violation of the injunction, and defend against the ensuing contempt charge on the ground that *Aguilar* was no longer good law. The district court properly dismissed that suggestion.[40] This Court has said that "outstanding injunctive orders of courts [must] be obeyed until modified or reversed by a court having the authority to do so." *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439 (1976). This principle—the collateral bar rule—buttresses the case for consideration under Rule 60(b):

> There is necessarily a counterpart to this well-established insistence that those who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonable and proper objections to that order, until it is modified or reversed. The counterpart is that *when such persons heed this well-established rule and prosecute their remedy first by a motion to modify in the issuing court and then, failing there, by appeal of that court's denial of their motion, they are entitled in a proper case to obtain a definitive disposition of their objections.*

Id. at 440 (emphasis added). Having followed the prescribed procedure, petitioners are entitled to a "definitive disposition of their objections" in this case. *Id.*

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[40] "[A]s a procedural device, [the Rule 60(b) motion] is far preferable to contemptuously defying the injunction by placing teachers back in the parochial schools, the course that, according to counsel for the plaintiffs at oral argument, is the only proper means of obtaining appellate review of the continuing validity of the injunction." Pet. App. 9a-10a.

D. There Are Adequate Grounds for Relief from the Judgment

Rule 60(b), which provides the vehicle for the exercise of the court's inherent power to modify its injunctions, also outlines the accepted grounds for the exercise of that power.[41] Of particular relevance here, Rule 60(b) recognizes that relief may be granted if "(5) . . . it is no longer equitable that the judgment should have prospective application; or (6) [for] any other reason justifying relief from the operation of the judgment."

The enormous costs of compliance with *Aguilar*, and the disruptive effect it has had on a major governmental program, make it "no longer equitable that the judgment should have prospective application." Rule 60(b)(5). The intervening developments in the governing Establishment Clause principles reinforce that conclusion and provide "other reason[s]" as well for relief under Rule 60(b)(6). That provision "grants federal courts broad authority to relieve a party from a final judgment 'upon such terms as are just'. . . . [I]t provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.'" *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988) (quoting *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949)).[42] It is well-established that "intervening and supervening edicts of the Supreme Court . . . qualify under

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[41] "Rule 60(b) does not assume to define substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief." Advisory Committee on Rules—1946 Amendment: Note to Subdivision (b).

[42] *See also Klapprott*, 335 U.S. at 614 (rejecting claim that "other reason" clause of Rule 60(b)(6) is limited only to grounds available under pre-Federal Rules writs).

the Rule as a 'reason justifying relief from the operation of the judgment.'" *Griffin v. State Board of Education*, 296 F. Supp. 1178, 1182 (E.D. Va. 1969).

The district court and the court of appeals agreed that the petitioners had "properly proceeded under Rule 60(b)," and therefore considered their arguments on the merits. Pet. App. 9a; *see also id.* 13a. The courts below also agreed that there had been significant changes in the law: "In the years since the Supreme Court's *Aguilar* decision, the landscape of Establishment Clause decisions has changed." Pet. App. 4a. "[I]t is at least unusual, if not extraordinary," the district court observed, "that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 7a-8a.

The district court and the court of appeals were understandably unwilling to grant the requested relief in the absence of an explicit overruling of *Aguilar* by this Court. But this Court need not hesitate to do what the lower courts concluded that *only* this Court can do.[43]

"Law of the case" does not stand in the way of this Court's overruling *Aguilar* at this stage of this case, any more than *stare decisis* would stand in the way of the

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[43] District courts have on occasion decided not to follow Supreme Court precedent when they thought intervening events had deprived the precedent of continuing force. *See, e.g., Browder v. Gayle*, 142 F. Supp. 707, 715-17 (M.D. Ala.) (refusing to follow *Plessy v. Ferguson*, 163 U.S. 537 (1896)), *aff'd*, 352 U.S. 903 (1956); *Barnette v. West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942) (refusing to follow *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1939)), *aff'd*, 319 U.S. 624 (1943). More commonly, when a precedent of this Court has not been overruled explicitly, a district court will follow that precedent no matter how precarious its footing. It then falls to this Court to decide whether to accept the issue for review and overrule its precedent.

Court's overruling *Aguilar* in another case. Neither *stare decisis* nor law of the case is an absolute principle; both must necessarily accommodate intervening decisions and doctrinal developments that cast doubt on the earlier decision.

"Law of the case directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). It is "not an inviolate rule," but "merely expresses the general practice of refusing to reopen what has been decided." *United States v. Melendez-Carrion*, 820 F.2d 56, 60 n.1 (2d Cir. 1987).[44] And one of the "major grounds justifying reconsideration [is] an intervening change of controlling law." *DiLaura v. Power Authority*, 982 F.2d 73, 76 (2d Cir. 1992) (quotations and citations omitted).

Since *Aguilar* was decided twelve years ago, there have been significant developments in the law that have not only undermined the rationale of that decision, but also foreclosed any other basis for its result. The entanglement test on which *Aguilar* was based has been criticized by the full Court and all but abandoned. Intervening decisions such as *Rosenberger*, *Zobrest* and *Witters* support the provision of on-site Title I services on a religion-neutral basis. If these developments were not sufficiently clear to enable the courts below to grant the relief that has been requested, they are surely strong enough indications of a change to warrant a clear statement by this Court as to whether *Aguilar* any longer reflects the current understanding of the Establishment Clause.

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[44] Likewise, *stare decisis* is "a useful rule, but not an inexorable command." *Erie R.R. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring).

CONCLUSION

For the foregoing reasons, *Aguilar* should be overruled. The judgment of the court of appeals should be reversed, and the case remanded with instructions to vacate the injunction.

Respectfully submitted,

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